



## Submission on the Regulations Amending the Investment Canada Regulations and National Security Review Regulations

### **A submission to Industry Canada on the regulations amending the Investment Canada regulations and the national security review of investments regulations**

We welcome the opportunity to respond to the Canada Gazette notice of July 11, 2009 for the Government of Canada's consultations on proposed regulations amending the Investment Canada regulations and the national security review of investments regulations. Also, we would like to put on record our concerns on the short consultation process that did not allow enough time for a full review with our members.

The Canadian Chamber of Commerce, representing 175,000 businesses from coast to coast to coast, is pleased with the federal government's commitment to amend the *Investment Canada Act*, specifically raising the thresholds for reviews and reforming sectoral investment restrictions such as in the transportation and uranium sectors. However, we have concerns with two parts of the proposed regulations, the application and timing of the national security review mechanism and the definition of 'enterprise value'.

### **National Security Review Mechanism**

Canada has greatly benefited from foreign investment. Open investment regimes are essential for attracting much needed capital and know-how that strengthen Canadian business' competitive position in the global economy. As part of Canada's investment regime, the government has a role to play to safeguard national security while making sure that Canadian companies are not competitively hurt by companies that have foreign government support and do not operate within a market framework. However, such interventions should be the exception and any measures should not discriminate against legitimate foreign investors.

While we support putting in place a national security review mechanism for foreign investments, we are concerned that the regulations, as currently written, could discourage investors from entering Canada. First, neither the *Investment Canada Act* nor the regulations specify what would or could trigger a national security review, giving potential foreign investors little guidance on whether their transaction is reviewable. Until there is greater clarity on the scope of the criteria that triggers the review, foreign investors could be discouraged from entering Canada. We recommend that national security be explicitly defined and that a review should take place according to concrete, objective, and transparent criteria within an established timeframe. We need to send a clear and positive message to foreign investors that Canada welcomes inbound foreign investment and as a matter of principle, the origin of the investor should not play a role in the review of investment. Furthermore, as outlined in the government's policy related to state-owned enterprise and sovereign wealth fund investments, the focus should be put on the transparency of operations and other commercial drivers of potential foreign investors instead of their ownership structure or nationality.

The length of time for a national security review to take place is another point of contention. Depending on the review's circumstances and how many stages it goes through, the whole process could take more than 130 days! In some cases, a national security review could be ordered up until 45 days after the transaction closes. We recommend that the regulations be amended to provide for a voluntary pre-closing clearance process where an investor can file a notice 45 days before closing to determine if the transaction raises concerns on national security grounds. And to encourage more pre-closing clearance, we recommend that notification filing be kept confidential so that investors are assured that their investment will not be disclosed before the transaction closes. Pre-closing clearance gives more predictability to investors, encouraging foreign investment in Canada. A voluntary pre-closing national security review process is particularly appropriate where the concept of 'national security' is undefined and applies to all transactions, including those where control of a Canadian business is not acquired (i.e. even minority investments are captured).

### **Enterprise Value**

The Canadian Chamber is pleased that the *Investment Canada Act* is being amended to use enterprise value, rather than gross assets, as the standard for measuring foreign investment proposals. Enterprise value better measures the true value of an investment by including non-balance sheet items such as know-how, intellectual property, people, and other intangible assets. However, we are concerned that the enterprise value threshold only applies to publicly traded companies whereas the book value method is used in investments of private companies and asset acquisitions. This seems to be at odds with the Competition Policy Review Panel's recommendations.

Also, we are concerned with the definition of enterprise value. According to the draft regulations, enterprise value is determined by calculating the market capitalization over the last 20 days of the last fiscal quarter of a given company. But in many cases, determining the average number of shares outstanding for the 20 day period may not be publicly available and therefore difficult to calculate. Indeed, publicly traded companies are only required to report the amount of outstanding shares at the end of a fiscal year. Second, market capitalization could fluctuate significantly between an investment's announcement and the closing of the transaction. The unpredictability could leave the foreign investor unsure about whether to make an application through the *Investment Canada Act*. One potential idea is to change the enterprise value regulations to mean market capitalization on a specific reference date. A foreign investor would then be able to use the company's public records to determine the value of their investment and whether the approval process should be pursued.

In light of the foregoing, we urge further consultations to determine the best way to measure enterprise value of private companies and asset acquisitions.